

REMARKS

Claims 1-20 are now pending in the application. The Examiner is respectfully requested to consider the amendments and remarks contained herein.

ELECTION/RESTRICTION REQUIREMENT

The Office Action requires that a restriction to one of the following inventions is required under 35 U.S.C. § 121:

Group I. Claims 1-17, classified in 606/105

Group II. Claims 18-20, classified in 606/105

Lack of Prima Facie Showing of Unrelated Claims

The Applicant respectfully requests consideration and withdrawal or modification of the initial restriction requirement because the Applicant submits that the Examiner has not established a prima facie showing that the claimed inventions are independent and that there is a serious burden on the Examiner. The Examiner can show the claimed inventions are independent by providing an appropriate explanation of separate classification, or separate status in the art, or a different field of search as defined in MPEP § 808.02. In the instant application, Groups I and II are both classified in the same class and subclass.

Election with Traverse

Applicants, with traverse, elect Group I, which includes each of the presently pending claims 1-17. This election was discussed with Examiner Shaffer on November 15, 2005.

Applicants would like to thank the Examiner for the interview granted with Applicants' representative on November 15, 2005. During the interview the Restriction Requirement was discussed including its requirement, a showing for its requirement, and in relation to the various scopes of the claims.

As noted by the Office Action, each of the independent claims could be classified in the same class and subclass. Further, the subject of each of the independent claims is similar enough to be a part of a single search and single field of search. As such, there is not a serious burden to search each of the claims as they are presently pending. (See MPEP 803 and 808.02)

Also, the Applicant submits that each of the claims are in condition for allowance and requests that the Examiner allow the same and pass the present application to issuance without further delay.

Petition Director

If the restriction requirement is maintained in its present form and made final, the Applicant preserves the right to petition the Director to review the requirement now or may defer the petition until after final action or allowance of claims to the invention elected (37 C.F.R. § 1.144).

SPECIES RESTRICTION/ELECTION REQUIREMENT

The Office Action asserts that the present application includes patentably distinct species from which an election is required under 35 U.S.C. § 121 from:

- Species I: Figure 1
- Species II: Figure 4
- Species III: Figure 6
- Species IV: Figure 7
- Species V: Figure 8
- Species VI: Figure 9
- Species VII: Figure 10

SPECIES RESTRICTION

Initially the Applicant notes that the present application is a divisional application of U.S. Pat. App. 09/838,456 which required an election between a first asserted species illustrated in Figs. 1-8 and a second asserted species in Figs. 9-12. In that application an election was made to the first asserted species and claims drawn to the second asserted species were withdrawn. The present Office Action, however, appears to reassert the same species election requirement and others. Specifically, the Office Action appears to divide the previously asserted species of Figs. 9-12 into at least two species, here Species VI and VII.

The Applicant, also respectfully traverses the initial species restriction requirement because the Applicant submits that there is disclosure of a relationship between the species. The specification discloses the relationship among the species

insofar as each device is meant to assist in distracting joint with a spheroidal member. Further, even if a relationship between the inventions has not been established, the Applicant submits that the Applicant has submitted a reasonable number of species; therefore, the restriction requirement is inappropriate. 37 C.F.R. § 1.146.


Nevertheless, Applicant elects, with traverse, to have first examined Species VI which is illustrated in at least Figs. 9, 11, and 12, but does not disclaim the subject matter of the other species and reserves the right to have them recombined with the subject application when a generic claim is allowed. Applicant asserts that, of the elected claims, claims 1-17 read on Species VI.

CONCLUSION

It is believed that a full and complete response has been made to the outstanding Office Action and the present application is in condition for allowance. Thus, prompt and favorable consideration of this amendment is respectfully requested. If the Examiner believes that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at (248) 641-1600.

Respectfully submitted,

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